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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

LAWRENCE WINGATE
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes and Constitutional Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	7
Conclusion	14

Appendices

A.	Docket Entries	15
B.	Indictment	18
C.	Transcript of the Plea	23
D.	Transcript of Sentence	32
E.	Opinion and Order of the Sixth Circuit Court of Appeals	37

TABLE OF AUTHORITIES

Page

Holland v United States, 348 US 121, 75 S Ct 127 (1954) 11

McCarthy v United States, 394 US 459, 89 S Ct 1166, 22 L Ed 2d 418 (1969) 2, 7-13

United States v Berlin, 437 F 2d 901 (CA7 1971) ... 12

United States v Birmingham, 454 F 2d 706 (CA10 1971) 12

United States v Rex, 465 F 2d 877 (CA6 1972) 12, 13

Statutes Cited

Rule 11, Federal Rules of Criminal Procedure 2, 3, 8, 9, 10, 11, 12, 13

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vs.

UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, by his attorneys Frederick B. Bellamy and Neil H. Fink, prays that a Writ of Certiorari issue to review the judgment heretofore entered against them by the United States Court of Appeals, Sixth Circuit.

1. OPINIONS BELOW

Petitioner entered a plea of guilty (Appendix C) in the United States District Court for the Eastern District of Michigan, Southern Division on July 10, 1973, to one count of a five count indictment, in violation of 26 U.S.C. 7201 (Appendix B), and sentenced Petitioner to fourteen months confinement (Appendix D). Petitioner moved to withdraw the plea of guilty, which Motion was denied by the trial court. Petitioner appealed. On March 5, 1974, the Sixth Circuit Court of Appeals affirmed Petitioner's conviction via a per curiam opinion herein set forth as Appendix E.

2. JURISDICTION

The opinion and judgment of the Sixth Circuit Court of Appeals was entered on March 5, 1974. The jurisdiction of this Court is invoked pursuant to 28 USC 1254.

3. QUESTIONS PRESENTED

Did the Trial Court's acceptance of Petitioner's plea of guilty, and the Circuit Court of Appeals' affirmance of Petitioner's plea-based conviction fail to meet the requirements of Rule 11, Federal Rules of Criminal Procedure, and this Court's decision in *McCarthy v United States*, 394 US 459 (1969) in that: (a) the plea was not shown to be made voluntarily and with an understanding of the charge to which the plea was entered; and (b) there was no substantial factual basis made out for the plea?

4. STATUTES AND CONSTITUTIONAL PROVISIONS

Principally involved herein is Rule 11 of the Federal Rules of Criminal Procedure:

> A defendant may plead not guilty, guilty, or with the consent of the Court, *nolo contendere*. The Court may refuse to accept the plea of guilty, and shall not accept such a plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and consequences of the plea. If a defendant refuses to plead or if the Court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the Court shall enter a plea of not guilty. The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

Also involved is 26 U.S.C. 7201 which provides as follows:

> *Section 7201. Attempt to Evade or Defeat Tax.*
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. (Aug. 16, 1954, c. 736, 68A Stat. 851.).

5. STATEMENT OF THE CASE

The Appellant, Lawrence Wingate, was charged in a five-count Indictment with a violation of Section 7201, Internal Revenue Code; 26 U.S.C. Section 7201, on March 28, 1973. His wife, Annie, was indicted as well on the same charges.

On July 10, 1973, a plea of guilty was entered on behalf of Defendant, Lawrence Wingate, to Count IV of the Indictment, charging him with wilfully and knowingly attempting to evade and defeat a large portion of his income due and owing by him to the United States for the calendar year 1969. Said Count involved a violation of 26 U.S.C. 2701, of the Internal Revenue Code. The plea was taken by the Honorable Robert E. DeMascio, United States District Judge for the Eastern District of Michigan, Southern Division.

During the proceedings, the following exchange took place between Appellant Wingate and the Court:[1]

> "The Court: *Well, tell me what you did, Mr. Wingate, that makes you think you're guilty?*
>
> Mr. Wingate: *Well, I just didn't file enough.*
>
> The Court: *You knew that you had to file more?*
>
> Mr. Wingate: *Well, I didn't know. I thought I was filing right, I thought, but I find I wasn't so I couldn't tell, see.*
>
> The Court: *Well, did you have income in the amount of approximately $85,000.00?*
>
> Mr. Wingate: *I think I must have, I must have.*
>
> The Court: *Who filled out your return?*

[1] The full transcripts of plea and sentence are contained as Petitioners Appendices C and D.

Mr. Wingate: *Let's see.*

The Court: *Did you have it done for you?*

Mr. Wingate: *Yes, sir.*

The Court: *Did you tell him all that you made?*

Mr. Wingate: *Well—*

The Court: *Where did he get the figure 42,193.64, from you?*

Mr. Wingate: *Yes. He got what I, you know, gave him. I thought, you know, I was giving him enough.*

The Court: *You thought you were giving him enough, but you knew you weren't giving him it all, didn't you?*

Mr. Wingate: *No, I thought I was giving—you know, my knowledge, you know.*

The Court: *Well, how could you give him forty-two thousand when you made eighty-five? It looks like you gave him information concerning half of what you made.*

Was this a joint return, Mr. Walker?

Mr. Walker: *Yes, your Honor. The return was prepared for them by a man that's familiar with making out tax returns, and they did not have records, they didn't keep books. Their income was arrived at, I believe, in conference with this man that made out the return and income was determined largely from deposits.*

The Court: Well, how does the government compute the eighty-five thousand?

Mr. Walker: By net worth.

The Court: What do you do for a living, Mr. Wingate?

Mr. Wingate: Well, I been fixing, doing carpentry work, houses and stuff like that.

The Court: You've been doing what?

Mr. Wingate: Carpenter work.

The Court: Carpenter work?

Mr. Wingate: Yes.

The Court: Well, you didn't make forty-two thousand dollars doing carpenter work, did you?

Mr. Wingate: No, no. That's what I—

The Court: If you did. I've got to quit.

Mr. Wingate: No.

The Court: In other words, you had income in addition to your carpentry work?

Mr. Wingate: Yeah, uhm-hmm.

The Court: What was that income from?

Mr. Wingate: Well, I was doing a little gambling.

The Court: Gambling?

Mr. Wingate: Yes.

The Court: You're a gambler?

Mr. Wingate: Well, yes, I am.

The Court: What you're telling the court is that you didn't declare any of your gambling income? Is that what you're telling me?

Mr. Wingate: Well, this—

Mr. Walker: I don't think that's quite right, your Honor. The gambling income went into the bank account, too.

The Court: Did all of it?

Mr. Walker: Well, apparently not, according to the reconstruction by use of a net worth.

The Court: Well, the net worth was acquired by the accumulation of deposits in and out of the account?

Mr. Walker: No; assets, increase of assets.

The Court: Assets?

Mr. Walker: Each year, over increase of obligations.

The Court: Well, the bank deposits were part of the increased asset theory?

Mr. Pritchard: Your Honor, that's right. Mostly it was just assets minus his liabilities. We came up with the net worth increase of over half in that one particular year, some eighty-some thousand dollars, when he should have reported that amount and only reported forty-some thousand.

The Court: Is that correct, Mr. Wingate?

Mr. Wingate: Yes.

The Court: All right. I'll accept the plea from Mr. Wingate and I'll refer him to the probation department for pre-sentence investigation report."

On the basis of the plea of guilty, on September 28, 1973, Mr. Wingate was sentenced to 14 months imprisonment and was fined $10,000.00. Counts 1, 2, 3 and 5 were dismissed upon the Government's motion.

6. REASONS FOR GRANTING THE WRIT

Petitioner urges that one good reason for granting a Writ of Certiorari in this case is that the Court of Appeals in affirming petitioner's conviction did so in haste, with total disregard of the explicit mandate of this Court's decision in *McCarthy* v *United States,* 394 US 459, 89 S Ct 1166, 22 L Ed 418 (1969), which directly controls the case at hand. Petitioner maintains that even the most cursory reading of the record will disclose that the principles enunciated in *McCarthy* along with Rule 11 were not adhered to by the District Court; petitioner's plea-based conviction then flies directly in the face of *McCarthy.*[1]

---

[1] Transcripts of the plea and sentence are set forth as appendices C and D.

Since the decision of this Court in *McCarthy,* it has been clear that the requirements embodied in Rule 11 of the Federal Rules of Criminal Procedure impose a high degree of full and diligent compliance on the part of the District Court judges in accepting pleas of guilty in Federal criminal cases.

Rule 11 of the Federal Rules of Criminal Procedure provides as follows:

> "A defendant may plead not guilty, guilty, or with the consent of the Court, *nolo contendere.* The Court may refuse to accept a plea of guilty, and shall not accept such a plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and consequences of the plea. If a defendant refuses to plead or if the Court refuses to accept a plea of guilty, or if a defendant corporation fails to appear, the Court shall enter a plea of not guilty. The Court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

Had the District Court fully complied with Rule 11, an appeal would not have been necessitated. To sentence Lawrence Wingate to imprisonment on a guilty plea to a crime whose elements he repeatedly denied having committed, clearly resulted in a manifest injustice. The admissions made by the defendant fall far short of the criminal conduct encompassed in the charge.

Petitioner urges that the plea proceeding violated the requirements of Rule 11 in two particulars: (a) the plea was made involuntarily due to the court's failure to in-

form him of the nature of the charge, and; (b) there was no factual basis for the plea.

Rule 11 is explicit in its requirement that the Court not accept a plea of guilty without first addressing the defendant personally and determining that the defendant understand the nature of the charge and consequences of the plea. In *McCarthy, supra*, a case involving an alleged violation of Sec. 7201 of the Internal Revenue Code, as does the present case, this Court explained the necessity; for upholding rigorous standards in ascertaining whether or not the defendant actually possesses an understanding of the nature of the charge:

> "A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due process Clause, it must be 'an intentional relinquishment or abandonment of a known right or a privilege.' [citation omitted.] Consequently, if a fendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission to all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."

At no time did the court below attempt to ascertain whether the defendant in the present case possessed "an understanding of the law in relation to the facts." nor did it explain the elements of the offense charged in an effort to insure that defendant's plea would be taken in compliance with Rule 11. Indeed, the court apparently felt

that a mere recital of the statutory language contained in the indictment coupled with the question, "Do you understand that?" would suffice to adequately apprise the defendant—schooled only through the Fifth grade—of the nature of the charges against him. It is inconceivable that the Defendant's answer would serve to inform the court that, in fact, he understood the charge, so that the plea could then be accepted. This clearly flies in the face of Rule 11 as unsatisfactory.

In failing to explain the nature of the charges set forth in the Indictment in detail, the defendant was prevented from forming an accurate and considered opinion as to how he should plead. Indeed, Mr. Wingate's responses to the Court's questions regarding his guilt are a clear indication that he never understood the nature of the charges and the elements of the offense. Throughout the exchange, Wingate expressed doubt each time he was asked any questions relating to the element of intent, which is an essential element of a violation of 26 USC 7201.

As this Court recognized in *McCarthy, supra,* at 471:

> " . . . It is certainly conceivable that he may have intended to acknowledge only that he in fact owed the Government the money it claimed without necessarily admitting that he committed the crime charged: for that crime requires the very type of specific intent that he repeatedly disavowed . . . Moreover, since the elements of the offense were not explained to petitioner, and since the specific acts of tax evasion do not appear on the record, it is also possible that if petitioner had been adequately informed, he would have concluded that he was actually guilty of one of two closely related lesser included offenses, which are mere misdemeanors."

The petitioner's own replies to the Court's inquiries in the present case clearly indicate that he did not understand the essential elements of the issue he was charged with.

Moreover, Rule 11 requires more than inquiry on the part of the Court as to the defendant's understanding of the nature of the charge and consequence of the plea; it also requires that the judge be "satisfied that there is a factual basis for the plea".

As was recognized in *McCarthy, supra,* at 467:

> "The Judge must determine that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Requiring this examination of the relation between the law and the act the defendant admits having committed is designed to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge."

In the exchange with the Court, Lawrence Wingate repeatedly disavowed the requisite criminal intent;[2] his lack of education contributed to his difficulty in assessing whether or not he had committed the offense charged. In his response to the Court's inquiry as to what made him think he was guilty, he replied that he just didn't file enough. He further stated that he thought he was filing correctly but that he could not tell. He stated that, as far

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[2] *Holland* v. *United States*, 348 US 121, 75 S Ct 127 (1954).

as he knew, he gave the person who prepared his return the correct amount. Nowhere does the record indicate that the defendant did not declare any alleged gambling income. Further, it is inconceivable that a person educated only through the fifth grade could understand the complex process of a net worth determination of income. Yet, when Mr. Pritchard made a cursory explanation of net worth increased assets theory, Mr. Wingate was asked by the Court, he admitted that with no further explanation. The Court should properly have refused to accept the plea.

In reversing a narcotics conviction based on the lack of factual basis for the plea, the Tenth Circuit Court of Appeals explained this aspect of Rule 11 as set forth in *McCarthy*:

> " 'In *McCarthy,* it was held that Rule 11 not only requires the trial judge before accepting a tendered plea of guilty to make inquiry as to the defendant's understanding of the nature of the charge and the consequences of the plea, but also requires the trial judge to satisfy himself that there is a factual basis for the plea.' *United States* v *Birmingham,* 454 F2d 706 (CA10 1971.)"

In *United States* v *Berlin,* 437 F2d 901 (CA7 1971), the court upheld a conviction because the trial court went to *great lengths in personal interrogation* to determine that the conduct defendant admitted constituted the offense charged.

In the present case, however, no such statement can be made. In *United States* v *Rex,* 465 F2d 875 (CA6 1972) the same court which so blithely ignored the deficiencies of the instant plea proceeding, upheld the proposition that strict adherence to the requirements of Rule 11 is neces-

sary. In holding that the failure of the trial court to inform a person of ineligibility for parole was a violation of Rule 11, this Court stated:

> "We then find that a failure to comply with Rule 11 makes it necessary for the appellate court to vacate the plea and remand the case 'for another hearing at which he may plead anew.'" *United States* v *Rex, supra,* at 878.

Clearly, the purpose of Rule 11 is to obviate a later claim by a defendant that he did not understand the nature of the charge:

> "There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him." *McCarthy, supra* at 1173.

It is incontrovertible that, in the present case, petitioner never admitted that his conduct fell within the bounds of illegal activity that he was charged with. Perhaps more careful interrogation would have disclosed on the record a different factual situation, thus obviating the need for this appeal. However, the failure to do so constitutes error on the part of the trial court.

7. CONCLUSION

Wherefore, by reason of the foregoing premises, petitioner prays that this Court issue a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit and hear this case on the merits.

Respectfully submitted,

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8. APPENDICES

APPENDIX A

IN THE

District Court of the United States

For the Eastern District of Michigan
Southern Division

RELEVANT DOCKET ENTRIES

1973

Mar.	28.	Indictment and Report, filed.
Apr.	4.	Defts. Lawrence and Annie Wingate arr., rep. by counsel, defts. stand mute, pleas of not guilty entered, defts. released on $5,000.00 personal bonds; Hackett, M.
Apr.	4.	Acknowledgments of Defts. Lawrence and Annie Wingate, filed.
Apr.	4.	Personal bond in $5,000 as to Deft. Lawrence Wingate, filed.
Apr.	4.	Order re release, filed and entered. (Lawrence Wingate); Hackett, M.
Apr.	4.	Order re relase as to Deft. Annie Wingate, filed and entered; Hackett, Mr.
Apr.	4.	Personal bond in $5,000.00 as to Deft. Annie Wingate, filed.
Apr.	4.	Appearance, filed (Walker).
Apr.	4.	Voice transcript of April 4/73, filed.
Apr.	6.	Notice of trial set for June 14/73, filed.

June 5. Amended notice of trial set for July 10/73 at 9:00, filed.

July 10. Defts. Wingate rep. by counsel, defts. plead guilty to Count 4 ref, to probation, bonds continued; DeMascio, J.

Sept. 28. Motion and order to dismiss various counts (Counts I, II, III and V) of an indictment as to both defts., filed and entered; DeMascio, J.

Sept. 28. Deft. Annie Wingate with counsel, Fred Walker. Deft. com. to custody of Atty. General for eighteen (18) months, sentence susp. and deft. placed on four (4) years prob. and fined $10,000.00 to be paid within ten (10) days—bond cancelled; DeMascio, J.

Sept. 28. Deft. Lawrence Wingate with counsel, Fred Walker Deft. comm. to custody of Atty General for fourteen (14) months and fined $10,000.00. Motion/stay of execution granted (2 weeks)—bond cancelled; DeMascio, J.

Oct. 5. Petition to vacate sentence and to permit deft., Lawrence Wingate, to withdraw his plea of guilty and plead anew; proof of service; and notice of hearing for Oct. 9/73 at 9:00, filed. NBA.

Oct. 9. Notice of appeal as to deft. Lawrence Wingate, filed.

Oct. 9. Proof of service re notice of appeal, filed.

Oct. 11. Court to set appeal bond in the amount of $10,000.00 personal bond; DeMascio, J.

Oct. 11. Personal bond in $10,000.00 on appeal as to deft., Lawrence Wingate, filed.

Oct. 11. Government's response to petition to vacate sentence and withdraw of a guilty plea as to deft. Lawrence Wingate, filed.

Oct. 12. Letter to atty. re appeal, filed.
Oct. 12. Proof of mailing re notice of appeal, filed.
Nov. 1. Memorandum order denying petition to withdraw the plea of guilty, filed and entered; DeMascio, J.
Nov. 2. Proof of mailing re memorandum order, filed.
Nov. 6. Transcript of July 10/73, filed.
Nov. 6. Transcript of Sept. 28/73, filed.
Nov. 12. Letter of mailing file to CCA, filed.

1974

Mar. 5. Conviction affirmed by Court of Appeals for the Sixth Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT

Eastern District of Michigan
Southern Division

United States of America, Plaintiff, v Lawrence Wingate and Annie Wingate, Defendants.	Criminal No. 48528 Violation: 26 U.S.C. 7201

INDICTMENT

The grand jury charges:

Count One

That on or about the 14th day of April 1967, in the Eastern District of Michigan, Lawrence and Annie Wingate, residents of Detroit, Michigan, who during the calendar year of 1966, were married, did knowingly attempt to evade and defeat a large part of their income tax due and owing by them to the United States of America, for the calendar year 1966, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District at Detroit, Michigan, a false and fraudulent joint income tax return on their behalf, wherein it was stated that their taxable income for said calendar year was the sum of fourteen thousand five hundred fifty-five dollars and thirty-seven cents ($14,555.37), and that the amount of tax due and owing thereon was the sum of one thousand two hundred three dollars and thirty-nine cents

($1,203.39), whereas, they then and there well knew their joint taxable income for the said calendar year was the sum of twenty-one thousand eight hundred thirty dollars and ninety-seven cents ($21,830.97), upon which said taxable income there was owing to the United States of America an income tax of three thousand two hundred seventy dollars and forty-six cents ($3,270.46).

In violation of Section 7201, Internal Revenue Code; 26 U.S.C. Section 7201.

Count Two

That on or about the 15th day of January 1969, in the Eastern District of Michigan, Lawrence and Annie Wingate, residents of Detroit, Michigan, who during the calendar year of 1967, were married, did knowingly attempt to evade and defeat a large part of their income tax due and owing by them to the United States of America, for the calendar year 1967, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District at Detroit, Michigan, a false and fraudulent joint income tax return on their behalf, wherein it was stated that their taxable income for said calendar year was the sum of nineteen thousand four hundred eight dollars and thirteen cents ($19,408.13) and that the amount of tax due and owing thereon was the sum of four thousand two hundred fourteen dollars and twenty-eight cents ($4,214.28) whereas they then and there well knew their joint taxable income for the said calendar year was the sum of sixty-three thousand twenty-one dollars and four cents ($63,021.04), upon which said taxable income there was owing to the United States of America an income tax of twenty-three thousand nine hundred one dollars and fifteen cents ($23,901.15).

In violation of Section 7201, Internal Revenue Code; 26 U.S.C. Section 7201.

Count Three

That on or about the 15th day of April 1969, in the Eastern District of Michigan, Lawrence and Annie Wingate, residents of Detroit, Michigan, who during the calendar year of 1968 were married, did knowingly attempt to evade and defeat a large part of their income tax due and owing by them to the United States of America, for the calendar 1968, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District at Detroit, Michigan, a false and fraudulent joint income tax return on their behalf, wherein it was stated that their taxable income for said calendar year was the sum of eighteen thousand eight hundred seventy-nine dollars and fifty-eight cents ($18,879.58), and that the amount of tax due and owing thereon was the sum of four thousand three hundred seventy-one dollars and twenty-five cents ($4,371.25), whereas, they then and there well knew their joint taxable income for the said calendar year was the sum of thirty-five thousand eight hundred seventy-eight dollars and twenty-six cents ($35,878.26), upon which said taxable income there was owing to the United States of America an income tax of nine thousand three hundred five dollars and eighty-eight cents ($9,305.88).

In violation of Section 7201, Internal Revenue Code; 26 U.S.C. Section 7201.

Count Four

That on or about the 15th day of April 1970, in the Eastern District of Michigan, Lawrence and Annie Wingate, residents of Detroit, Michigan who during the calendar year of 1969, were married, *did knowingly attempt to evade and defeat a large part of their income tax due and*

owing by them to the United States of America for the calendar year 1969, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District at Detroit, Michigan, a false and fraudulent joint income tax return on their behalf, wherein it was stated that their taxable income for said calendar year was the sum of forty-two thousand one hundred ninety-three dollars and sixty-four cents ($42,193.64), and that amount of tax due and owing thereon was the sum of fourteen thousand five hundred twelve dollars and twenty-six cents ($14,512.26), whereas, they then and there well knew their joint taxable income for the said calendar year was the sum of eighty-five thousand two hundred seventy-eight dollars and twenty-one cents ($85,278.21), upon which said taxable income there was owing to the United States of America an income tax of forty thousand forty-one dollars and forty-nine cents ($40,041.49).

In violation of Section 7201, Internal Revenue Code; 26 U.S.C. Section 7201.

Count Five

That on or about the 15th day of April 1971 in the Eastern District of Michigan, Lawrence and Annie Wingate, residents of Detroit, Michigan, who during the calendar year of 1970, were married, did knowingly attempt to evade and defeat a large part of their income tax due and owing by them to the United States of America for the calendar year 1970, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District at Detroit, Michigan, a false and fraudulent joint income tax return on their behalf, wherein it was stated that their taxable income for said calendar year was the sum of thirty-five thousand eight hundred eight dollars and one cent ($35,808.01), and that the amount of tax due and

owing thereon was the sum of ten thousand five hundred fifteen dollars and eighty-four cents ($10,515.84), whereas, they then and there well knew their joint taxable income for the said calendar year was the sum of forty-eight thousand six hundred thirty-five dollars and ten cents ($48,635.10), upon which said taxable income there was owing to the United States of America an income tax of sixteen thousand seven hundred eighty-six dollars and ninety-eight cents ($16,786.98).

In violation of Section 7201, Internal Revenue Code; 26 U.S.C. Section 7201.

This is a True Bill.

/s/ .....
Foreman

/s/ Ralph B. Guy, Jr.
United States Attorney

/s/ Laurence Leff
Attorney in Charge
Detroit Strike Force
United States Department of Justice
1064 Federal Building
Detroit, Michigan 48226
Telephone: 226-7252

Dated: 3-28-73

APPENDIX C

United States of America

UNITED STATES DISTRICT COURT

for the Eastern District of Michigan
Southern Division

United States of America, Plaintiff, v Lawrence Wingate and Annie Wingate, Defendants.	Criminal No. 48528

TRANSCRIPT OF THE PLEA

Proceedings had in the above-entitled matter before the Honorable Robert E. DeMascio, United States District Judge, at Detroit, Michigan, on Tuesday, July 10, 1973.

Appearances: Clyde Pritchard, Esq., Appearing on behalf of the United States of America; Fred Walker, Esq., Appearing on behalf of Defendants.

(2)

Detroit, Michigan
Tuesday, July 10, 1973

The Clerk of the Court: Case number 48528, United States v Lawrence Wingate.

Are counsel ready?

Mr. Pritchard: Ready for the government, your Honor.

Mr. Walker: Defendant is ready.

The Court: Yes, Mr. Walker?

Mr. Walker: At this time, your Honor, I ask leave of this court to withdraw the plea of not guilty that has been heretofore entered on behalf of Mr. and Mrs. Wingate and to tender a plea to count four of the indictment.

Mr. Pritchard: That's the government's understanding, your Honor, and we're—

The Court: Do you have any other understanding?

Mr. Pritchard: No, sir, we do not.

The Court: Are you Lawrence Wingate?

Mr. Wingate: Yes, sir.

The Court: And you're Annie Wingate?

Mrs. Wingate: Yes.

The Court: Now, speak up so I can hear (3) you.

Mrs. Wingate: Yes.

The Court: How old are you, Mr. Wingate?

Mr. Wingate: Forty-six.

The Court: Mrs. Wingate?

Mr. Wingate: Forty.

Mrs. Wingate: Forty.

The Court: How far in school did you go, Mr. Wingate?

Mr. Wingate: Fifth grade.

The Court: Mrs. Wingate?

Mrs. Wingate: One year of college.

The Court: Well, Mr. Wingate, do you understand what is going on here today?

Mr. Wingate: Yes, sir.

The Court: Now, you heard your lawyer say that you wish to withdraw your plea of not guilty and enter a plea of guilty to count four of the indictment?

Mr. Wingate: Yes, sir.

The Court: Now, do you understand that this count, the fourth count of this indictment, charges you with knowingly and wilfully attempting to evade and defeat a large portion of your income tax on your 1969 return by filing

and causing to be filed a false and fraudulent (4) joint income tax return wherein you stated that your taxable income for that calendar year was $42,193.00 and that you owed $14,512.00, whereas you had an income of $85,000.00 and should have paid an income tax of $40,000.00? Do you understand that?

Mr. Wingate: Yes.

The Court: Now, did anybody promise you anything, Mr. Wingate, to cause you to plead guilty?

Mr. Wingate: No, sir.

The Court: Did anybody tell you that the court would go easier on you or give you probation if you pleaded guilty?

Mr. Wingate: No, sir.

The Court: Did anybody threaten you in any way to make you plead guilty?

Mr. Wingate: No, sir.

The Court: Nobody is trying to talk you into it or putting any pressure on you?

Mr. Wingate: No, sir.

The Court: Then you're pleading guilty freely and voluntarily?

Mr. Wingate: Yes.

The Court: Now, you understand, Mr. Wingate, that you have a right to have a jury trial on this (5) charge or a trial by the court without a jury?

Mr. Wingate: Yes, sir.

The Court: You also understand that if you had a trial the burden would be upon the government to prove that you're guilty beyond a reasonable doubt, and that way you wouldn't have to plead?

Mr. Wingate: Yes.

The Court: You know that?

Mr. Wingate: Yes.

The Court: And do you understand that if you had a trial, you could remain silent throughout the entire trial and compel the government to prove the case against you?

Mr. Wingate: Yes.

The Court: Do you understand that?

Mr. Wingate: Yes, sir.

The Court: Do you also know that, on the other hand, you could testify in your own behalf or call witness in your own behalf if you wanted to?

Mr. Wingate: Yes.

The Court: Knowing that, you still wish to plead guilty to count four; is that it?

Mr. Wingate: Yes.

The Court: Now, you understand that if (6) the court accepts your plea of guilty to this count you could go to a government institution for up to five years and pay a $5,000.00 fine—

Mr. Walker: Ten thousand dollars.

The Court: —ten thousand dollars, or both?

Mr. Wingate: Yes.

The Court: You understand that?

Mr. Wingate: Yes.

The Court: Well, tell me what you did, Mr. Wingate, that makes you think you're guilty.

Mr. Wingate: Well, I just didn't file enough.

The Court: You knew that you had to flle more?

Mr. Wingate: Well, I didn't know. I though I was filing right, I thought, but I find I wasn't so I couldn't tell, see.

The Court: Well, did you have income in the amount of approximately $85,000.00?

Mr. Wingate: I think I must have, I must have.

The Court: Who filled out your return?

Mr. Wingate: Let's see.

(7) The Court: Did you have it done for you?

Mr. Wingate: Yes, sir.

The Court: Did you tell him all that you made?

Mr. Wingate: Well—

The Court: Where did he get the figure $42,193.64, from you?

Mr. Wingate: Yes. He got what I, you know, gave him. I thought, you know, I was giving him enough.

The Court: You thought you were giving him enough but you knew you weren't giving him it all didn't you?

Mr. Wingate: No, I thought I was giving—you know, my knowledge, you know.

The Court: Well, how could you give him forty-two thousand when you made eighty-five? It looks like you gave him information concerning half of what you made.

Was this a joint return, Mr. Walker?

Mr. Walker: Yes, your Honor. The return was prepared for them by a man that's familiar with making out tax returns, and they did not have records, they didn't keep books. Their income was arrived at, I (8) believe, in conference with this man that made out the return, and income was determined largely from deposits.

The Court: Well, how does the government compute the eighty-five thousand?

Mr. Walker: By net worth.

The Court: What do you do for a living, Mr. Wingate?

Mr. Wingate: Well, I been fixing, doing carpentry work, houses and stuff like that.

The Court: You've been doing what?

Mr. Wingate: Carpenter work.

The Court: Carpenter work?

Mr. Wingate: Yes.

The Court: Well, you didn't make forty-two thousand dollars doing carpenter work, did you?

Mr. Wingate: No, no. That's what I—

The Court: If you did, I've got to quit.

Mr. Wingate: No.

The Court: In other words, you had income in addition to your carpentry work?

Mr. Wingate: Yeah, uhm-hmm.

The Court: What was that income from?

Mr. Wingate: Well; I was doing a (9) little gambling.

The Court: Gambling?

Mr. Wingate: Yes.

The Court: You're a gambler?

Mr. Wingate: Well, yes, I am.

The Court: What you're telling the court is that you didn't declare any of your gambling income? Is that what you're telling me?

Mr. Wingate: Well, this—

Mr. Walker: I don't think that's quite right, your Honor. The gambling income went into the bank account, too.

The Court: Did all of it?

Mr. Walker: Well, apparently not, according to the reconstruction by use of a net worth.

The Court: Well, the net worth was acquired by the accumulation of deposits in and out of the account?

Mr. Walker: No, assets, increase of assets.

The Court: Assets?

Mr. Walker: Each year, over increase of obligations.

The Court: Well, the bank deposits (10) were part of the increased asset theory?

Mr. Pritchard: Your Honor, that's right. Mostly it was just assets minus his liabilities. We came up with the net worth increase of over half in that one particular year, some eighty-some thousand dollars, when he should have reported that amount and only reported forty-some thousand.

The Court: Is that correct, Mr. Wingate?

Mr. Wingate: Yes.

The Court: All right, I'll accept the plea from Mr. Wingate and I'll refer him to the probation department for pre-sentence investigation report.

Now, Mrs. Wingate, you understand what's going on here today, do you?

Mrs. Wingate: Yes.

The Court: Now, you heard your lawyer say that you wish to enter a plea of guilty to count four of this indictment?

Mrs. Wingate: Yes.

The Court: Now, you understand that if the court accepts a plea from you, you could go to a government institution for up to five years and pay a ten thousand dollar fine, or both?

Mrs. Wingate: Yes.

(11) The Court: Did anybody promise you anything to make you plead guilty?

Mrs. Wingate: No.

The Court: Did anybody tell you the court would go easier on you or give you probation if you pleaded guilty?

Mrs. Wingate: No.

The Court: Did anybody threaten you in any way to make you plead guilty?

Mrs. Wingate: No.

The Court: Then you say you're pleading guilty freely and voluntarily?

Mrs. Wingate: Yes.

The Court: You're pleading guilty because you are guilty and for no other reason?

Mrs. Wingate: Yes.

The Court: Now, you understand that you have a right to have a jury trial or a trial by the court on this charge?

Mrs. Wingate: Yes.

The Court: You also understand that if you had such a trial you would be presumed to be innocent and the burden would be upon the government to prove that you're guilty?

(12) Mrs. Wingate: Yes.

The Court: You also know that in that way you won't have to plead, you could sit and have the trial, remain silent, and nobody would be able to comment on that fact and at the same time compel the government to prove that you're guilty?

Mrs. Wingate: Yes.

The Court: You know that? You also know that if you had a trial you could testify in your own behalf and call witnesses if you wished?

Mrs. Wingate: Yes.

The Court: Knowing that, you say you wish to plead guilty, it that it?

Mrs. Wingate: Yes, I guess so.

The Court: I can't hear you.

Mrs. Wingate: Yes.

Mr. Walker: Mrs. Wingate is not well. She has an appointment with the doctor at eleven o'clock today. That's why she's having a little difficulty speaking, your Honor.

The Court: All right. Now, you understand, Mrs. Wingate, that this offense charges that in a joint return with your husband Lawrence Wingate you indicated in your 1969 return that both of you jointly had an income (13) of $42,000.00 when in truth and fact you had $85,278.00 with a tax due of $40,000.00; is that correct?

Mrs. Wingate: Yes.

The Court: Now, do you have any income of your own apart from your husband's?

Mrs. Wingate: No.

The Court: Do you help him with his gambling functions?

Mrs. Wingate: Sometimes.

The Court: How frequently, every day?

Mrs. Wingate: No, not every day.

The Court: Every other day?

Mrs. Wingate: Maybe every other day, something, maybe three or four times a week.

The Court: And you heard what he said about having income approximating $85,000.00, or he felt that income indication was true?

Mrs. Wingate: Yes.

The Court: You agree with that, do you?

Mrs. Wingate: Yes.

The Court: All right. I'll accept a plea of guilty from Mrs. Wingate and I'll refer both of them to the probation department for pre-sentence investigation reports.

(14) Mr. Walker: Thank you, your Honor.

Mr. Pritchard: Thank you, your Honor.

The Court: And I'll continue the bond.

(Matter concluded.)

I Hereby Certify That I recorded stenographically the proceedings had in the above-entitled matter before the Honorable Robert E. DeMascio, United States District Judge, at the time and place hereinbefore set forth, and that the foregoing is a full, true, and correct transcript of such stenographic notes.

/s/ Catherine Perry Drews

APPENDIX D

United States of America

UNITED STATES DISTRICT COURT

for the Eastern District of Michigan
Southern Division

United States of America, Plaintiff, v Lawrence Wingate and Annie Wingate, Defendants.	Criminal No. 48528

TRANSCRIPT OF SENTENCE

Proceedings had in the above-entitled matter before the Honorable Robert E. DeMascio, United States District Judge, at Detroit, Michigan, on Friday, September 28, 1973.

Appearances: Clyde Pritchard, Esq., Appearing on behalf of the United States of America; Fred Walker, Esq., Appearing on behalf of Defendants; Also present: Albert R. DeBiasi, Esq.

(2)

Detroit, Michigan
Friday, September 28, 1973

The Clerk of the Court: Case number 48528, the United States v. Lawrence Wingate.

Are counsel ready?

The Court: Are you Lawrence Wingate?

Mr. Wingate: Yes, sir.

The Court: Mr. Wingate, do you have anything to say before the court imposes sentence?

Mr. Wingate: No, sir.

Mr. Walker: Your Honor, you've been very kind in affording us a hearing before in chambers with others interested in this case, and I won't repeat what was said there, but I would like the court to know that I am fully aware of the awesome responsibility that is placed upon your shoulders.

I'm certainly grateful that it's not on mine, because while it may appear to the casual observer that you're just asked to impose sentence upon two people, you know and I know that whatever you do here today affects the lives of five, three of whom are children.

I know that Mr. Wingate and his wife have had some association with gambling, but I also know, (3) your Honor, that they have never been charged with or convicted of any crime of violence, and it is my opinion they're not criminals, they're not thugs who are roaming the streets holding up people, or hoodlums who are selling heroin to school children. I know also that they're truly repentant and I feel that if they're given the opportunity they will demonstrate that and prove it.

And therefore I ask your Honor, consistent with the dictates of your conscience, with your obligations through this court, to be as merciful as it's humanly possible in imposing the sentence.

The Court: I don't mind telling you that this sentence has given me great difficulty. I have more than one obligation to fulfill and on balance it has been very difficult.

And I don't mind telling you that, had I sentenced him yesterday morning until you came into chambers, the sentence would be quite different. It would be much more severe, but I frankly spent some weary hours on this par-

ticular man's sentence. And I'm still not persuaded that probation is warranted here, and I can't bring myself to do that. I've thought about it a long time, and I just can't bring myself to do that.

Mr. DeBiasi: Let me add one more (4) factor, if you will, your Honor.

The Court: But I will say to you that it was much more severe, Mr. Walker, yesterday, and had I sentenced him yesterday morning it would have been.

Now, I recognize that this man, from his record, is a gambler and has been a gambler, and I recognize, too, that this court hasn't, with just several exceptions—and I don't believe several, I think one exception, found it necessary to send those engaged in gambling of this nature to a prison term.

But this sentence here, this case here, I should say is aggravated in other respects.

You don't have an appearance in here, do you, Mr. DeBiasi?

Mr. DeBiasi: No, I don't, I'm sorry.

The Court: It is the sentence of the court that the defendant Lawrence Wingate be committed to the custody of the Attorney General of the United States for a term of fourteen months. It is an additional condition of sentence that he pay a ten thousand dollar fine, and that fine is committed.

Mr. Walker: Your Honor, in view of the fact that just recently Mr. Wingate's property was subjected to a warrant of restraint and he has been deprived of his (5) property, and he must make some provision for his family, may I please ask this court for a stay of execution of the sentence, or at least two weeks to give the man a chance to make some arrangements for his family to be looked after while he is gone?

The Court: Two weeks?

Mr. Walker: Two weeks?

Mr. Wingate: Yes.

Mr. Walker: Two weeks, your Honor.

The Court: That is granted.

Mr. Walker: Thank you, your Honor.

The Clerk of the Court: Case number 48528, United States v. Annie Wingate.

The Court: Are you Annie Mae Wingate?

Mrs. Wingate: Yes.

The Court: Do you have anything to say, Mrs. Wingate, before the court imposes sentence?

Mrs. Wingate: Yes, I do.

I'm very sorry, your Honor, that I have caused so much trouble, and if you give me one more chance I'll never come down here again.

Mr. Walker: What I had to say on behalf of Mr. Wingate applies aqually to this client, your Honor.

The Court: It is the sentence of the (6) court that the defendant Annie Wingate be placed on probation for a—excuse me, that she be committed to the custody of the Attorney General of the United States for a period of eighteen months. That sentence is suspended and she is placed on probation for a period of four years. A condition of that probation is that she pay a ten thousand dollar fine.

Now, do I have to commit that fine?

Mr. Walker: May I have ten days to raise it? I know where it can be borrowed for them.

The Court: Ten days?

Mr. Walker: Ten days, please, your Honor.

The Court: All right. Would you make the arrangements on the date and the notification of the payment with Mr. Cryder?

Mr. Walker: I will, your Honor, and I'll produce a receipt to him when it's paid.

The Court: I hope you understand, Mrs. Wingate, that I'm going to buy that, but if you do violate that probation, then of course you leave me no choice. That's clear to you, isn't it?

Mrs. Wingate: Yes, it is.

The Court: All right.

(7) Mr. Pritchard: Your Honor, this was a five-count indictment, they pleaded guilty to one of the counts. Counts one, two, three, and five, the government would ask would be dismissed.

The Court: They pleaded to count four?

Mr. Pritchard: Yes, sir.

The Court: Do you have—

Mr. Pritchard: I don't have the written order, I'll provide it for you, your Honor.

The Court: All right.

Mr. Walker: Thank you.

Mrs. Wingate: Thank you.

(Matter concluded.)

I Hereby Certify That I recorded stenographically the proceedings had in the above-entitled matter before the Honorable Robert E. DeMiscio, United States District Judge, at the time and place hereinbefore set forth, and that the foregoing is a full, true, and correct transcript of such stenographic notes.

/s/ Catherine Perry Drews

APPENDIX E

No. 73-2149

(United States Court of Appeals—Sixth Circuit)

(Filed March 5, 1974)

United States of America,
Plaintiff-Appellee,
v.
Lawrence Wingate,
Defendant-Appellant.

ORDER

Before: Phillips, Chief Judge, Weick and Miller, Circuit Judges.

Appellant was found guilty by Judge DeMascio of the Eastern District of Michigan of income tax violation for willfully attempting to evade the payment of taxes pursuant to 26 U.S.C. Sec. 7201. The finding of guilty was predicated upon the appellant's plea of guilty to the fourth count of an indictment. Appellant was sentenced to 18 months imprisonment and fined $10,000.00. The other four counts of the indictment were dismissed upon motion of the Government. Subsequently the appellant moved the court to withdraw his plea of guilty and to be permitted to enter a plea of not guilty, alleging that in imposing sentence the court failed fully to comply with Rule 11 of the Federal Rules of Criminal Procedure.

We have fully examined the record and have carefully considered the proceedings which took place in connection with appellant's arraignment when he was advised with

respect to his rights in entering a plea of guilty and the nature and effect of the plea. We find the appellant's claim on appeal to be wholly without merit and it is therefore ordered and adjudged that the judgment of conviction be and the same is hereby affirmed.

Entered by Order of the Court.

/s/ James A. Higgins,
Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1544

LAWRENCE WINGATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question raised by the petition is whether petitioner's plea of guilty to a charge of attempting to evade income taxes had a factual basis and was made voluntarily and with an understanding of the charge.

Petitioner and his wife were each charged by an indictment filed in the United States District Court for the Eastern District of Michigan with five counts of having willfully attempted to evade and defeat their income taxes for the years 1966 through 1970.

On July 10, 1973, petitioner and his wife, both of whom were represented by counsel, entered pleas of guilty in open court after being questioned extensively by the court (Pet. App. C 23-31). On September 28, 1973, petitioner was sentenced to 14 months' imprisonment and was fined $10,000; his wife was given an 18-month suspended sentence, placed on four years' probation,

and fined $10,000 (Pet. App. D 34-35). On the same day, the court granted the government's motion to dismiss the remaining four counts of the indictment (Pet. App. D 36).

On October 5, 1973, petitioner filed a motion in the district court for leave to vacate his sentence and withdraw his guilty plea on the ground that the court had not complied with Rule 11 of the Federal Rules of Criminal Procedure. Petitioner alleged that his plea was not shown to have been voluntarily made and with an understanding of the charge, and that there was no substantial factual basis made out for the plea. In a memorandum order,[1] the district court denied the motion. The court of appeals affirmed, finding petitioner's contentions to be "wholly without merit" (Pet. App. E 37-38).

Petitioner argues (Pet. 7-13) that the distict court did not follow *McCarthy* v. *United States,* 394 U.S. 459, with respect to its acceptance of his guilty plea under Rule 11. He urges that the court did not inform him of the nature of the charge and that there was no factual basis for his plea. But the transcript of the proceedings at the time petitioner's plea was accepted demonstrated that the court carefully explained to him the elements of the offense, the manner in which it was alleged to have been committed, the amount of income and tax alleged to have been willfully evaded, and the possible consequences of entering a plea of guilty (Pet. App. C 23-28). At this hearing petitioner indicated that he understood the charge and that he was pleading voluntarily (Pet. App. C 24-25). Moreover, petitioner responded to the court's questions that no one had

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[1]A copy of the district court's memorandum order is attached hereto as an Appendix, *infra.*

promised him anything to induce him to plead guilty, that no one had advised him that the court would impose a less severe sentence if he pleaded guilty, and that he knew that the consequence of a guilty plea could be a term of five years' imprisonment and a $10,000 fine (Pet. App. C 25-29). The court then undertook to determine why petitioner thought he was guilty. He responded that he "just didn't file enough" (Pet. App. C 26). In answer to the court's question of whether he had income in the amount of $85,000 in 1969—about twice the amount reported—petitioner replied, "I must have" (Pet. App. C 26). Finally, petitioner acknowledged at the hearing that he was in the gambling business, that he kept no books or records, and that the amounts of income which were furnished to his tax return preparer were largely determined from bank deposits (Pet. App. C 27-28).

Although petitioner principally relies upon *McCarthy* v. *United States*, 394 U.S. 459, that case is plainly distinguishable. In *McCarthy*, the district court not only did not ask questions upon which it could determine the factual basis for the plea, but it did not even state to the defendant the elements of the offense with which he was charged. The court merely relied upon statements by the defendant's attorney (394 U.S. at 473-474). Here, however, the court carefully informed petitioner of the nature of the charge and thoroughly questioned him and his attorney concerning the factual basis for the plea.

Petitioner further argues (Pet. 11-12) that his plea should have been vacated because he made some statements indicating that he did not realize he was not reporting all of his income. However, in *North Carolina* v. *Alford*, 400 U.S. 25, the Court upheld

the acceptance of a plea of guilty where the defendant had claimed his innocence at the time he entered his plea. The Court stated (400 U.S. at 37-38):

> When his plea is viewed in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered, see *McCarthy* v. *United States, supra,* at 466-467 (1969), its validity cannot be seriously questioned. In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it. [Footnotes omitted.]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

promised him anything to induce him to plead guilty, that no one had advised him that the court would impose a less severe sentence if he pleaded guilty, and that he knew that the consequence of a guilty plea could be a term of five years' imprisonment and a $10,000 fine (Pet. App. C 25-29). The court then undertook to determine why petitioner thought he was guilty. He responded that he "just didn't file enough" (Pet. App. C 26). In answer to the court's question of whether he had income in the amount of $85,000 in 1969—about twice the amount reported—petitioner replied, "I must have" (Pet. App. C 26). Finally, petitioner acknowledged at the hearing that he was in the gambling business, that he kept no books or records, and that the amounts of income which were furnished to his tax return preparer were largely determined from bank deposits (Pet. App. C 27-28).

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It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,

v.

LAWRENCE WINGATE, ANNIE WINGATE, DEFENDANTS

Criminal No. 48528

MEMORANDUM ORDER

On July 10, 1973, the defendants entered a plea of guilty to the fourth count of the indictment charging that they ". . . did knowingly attempt to evade and defeat a large part of their income tax due and owing . . . for the calendar year 1969 by filing and causing to be filed . . . a false and fraudulent joint income tax return wherein it was stated that the taxable income . . . was the sum of $42,193.64 . . . whereas they then and there well knew their joint taxable income . . . was the sum of $85,278.21."

Subsequent to the imposition of sentence, defendant LAWRENCE WINGATE filed a petition for withdrawal of his guilty plea. Defendant alleges that the court failed to fulfill the requirements of Rule 11 of the Federal Rules of Criminal Procedure. Defendant LAWRENCE WINGATE asserts that without an understanding of the formal charge against him, his plea cannot be considered voluntary; and, further, that the court failed to ascertain that there was a factual basis for the plea. Specifically, the defendant alleges that he was only guilty of understating his income for the year 1968 and that he did not ". . . wilfully and intentionally attempt to evade and defeat a large part of the income due and owing the United States of America . . ."

and that this specific intent must be established by evidence other than the mere understatement of income.

Rule 11 of the Federal Rules of Criminal Procedure requires that the district court ascertain that a plea is made voluntarily with the understanding of the nature of the charge and the consequence of the plea. The Rule thereafter provides:

> ". . . the court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

The petitioner does not dispute that the court adequately determined that his plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea. We have concluded that the record adequately demonstrates that the court ascertained that there was indeed a factual basis for the plea. The record contains the following:

* * *

> "THE COURT: Now, do you understand that this count, the fourth count of this indictment, charges you with knowingly and wilfully attempting to evade and defeat a large portion of your income tax on your 1969 return by filing and causing to be filed a false and fraudulent joint income tax return wherein you stated that your taxable income for that calendar year was $42,193.00 and that you owed $14,512.00, whereas you had an income of $85,000.00 and should have paid an income tax of $40,000.00? Do you understand that?
>
> "MR. WINGATE: Yes.

* * *

"THE COURT: Well, tell me what you did, Mr. Wingate, that makes you think you're guilty.

"MR. WINGATE: *Well, I just didn't file enough.*

"THE COURT: You knew that you had to file more?

"MR. WINGATE: Well, I didn't know. I thought I was filing right, I thought, but I find I wasn't, so I couldn't tell, see.

" THE COURT: Well, did you have income in the amount of *approximately $85,000.00?*

"MR. WINGATE: *I think I must have, I must have.*

"THE COURT: Who filled out your return?

"MR. WINGATE: Let's see.

"THE COURT: Did you have it done for you?

"MR. WINGATE: Yes, sir.

"THE COURT: Did you tell him all that you made?

"MR. WINGATE: Well—

"THE COURT: Where did he get the figure $42,193.64, from you?

"MR. WINGATE: *Yes. He got what I, you know, gave him.* I thought, you know, I was giving him enough.

"THE COURT: You thought you were giving him enough, but you knew you weren't giving him it all, didn't you?

"MR. WINGATE: No, I thought I was giving— you know, my knowledge, you know.

"THE COURT: Well how could you give him forty-two thousand when you made eighty-five? It looks like you gave him information concerning half of what you made.

Was this a joint return, Mr. Walker?

"MR. WALKER: Yes, your Honor. The return was prepared for them by a man that's familiar with making out tax returns, and they did not have records, they didn't keep books. Their income was arrived at, I believe, in conference with this man that made out the return, and income was determined largely from deposits.

"THE COURT: Well, how does the government compute the eighty-five thousand?

"MR. WALKER: By net worth.

"THE COURT: What do you do for a living, Mr. Wingate?

"MR. WINGATE: Well, I been fixing, doing carpentry work, houses and stuff like that.

"THE COURT: You've been doing what?

"MR. WINGATE: Carpenter work.

"THE COURT: Carpenter work?

"MR. WINGATE: Yes.

" THE COURT: Well, you didn't make forty-two thousand dollars doing carpenter work, did you?

"MR. WINGATE: No, no. That's what I—

* * *

"THE COURT: In other words, you had income in addition to your carpentry work?

"MR. WINGATE: Yeah, uhm-hmn.

"THE COURT: What was that income from?

"MR. WINGATE: Well, I was doing a little gambling.

"THE COURT: Gambling?

"MR. WINGATE: Yes.

"THE COURT: You're a gambler?

"MR. WINGATE: Well, yes, I am.

"THE COURT: What you're telling the court is that you didn't declare any of your gambling income? Is that what you're telling me?

"MR. WINGATE: Well, this—

"MR. WALKER: I don't think that's quite right, your Honor. The gambling income went into the bank account, too.

"THE COURT: Did all of it?

"MR. WALKER: Well, apparently not, according to the reconstruction by use of a net worth.

"THE COURT: Well, the net worth was acquired by the accumulation of deposits in and out of the account?

"MR. WALKER: No; assets, increase of assets.

"THE COURT: Assets?

"MR WALKER: Each year, over increase of obligations.

"THE COURT: Well, the bank deposits were part of the increased asset theory?

"MR. PRITCHARD: Your Honor, that's right. Mostly it was just assets minus his liabilities. We came

up with the net worth increase of over half in that one particular year, some eighty-some thousand dollars, when he should have reported that amount and only reported forty-some thousand.

"THE COURT: Is that correct, Mr. Wingate?

"MR. WINGATE: Yes.

"THE COURT: All right, I'll accept the plea from Mr. Wingate and I'll refer him to the probation department for pre-sentence investigation report."

It is clear from the above that the defendant indicated that he did not report all his income.[1] The defendant's tax return was filed on his behalf by a person knowledgeable in the filing of tax returns. The defendant advised that the individual filing his return did so upon information received from the defendant. But, it is quite clear that the defendant, because of his failure to keep adequate records, was not conscious of the amounts he actually earned. The defendant is in the gambling business and it is apparent the records from this business were not adequate. The defendant believed he was reporting a sufficient amount to cover income derived from that business.[2] The defendant's true income was computed by a net worth analysis. The defendant was not nor could he be expected to know the precise amount of income stated in the indictment. But, the

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[1]This is the only conclusion the court could draw from defendant's statement "Well, I just didn't file enough." When directly asked by the court whether he had income in the amount of approximately $85,000, the defendant answered "I think I must have, I must have."

[2]The defendant stated: "No, I thought I was giving – you know, my knowledge, you know."

"MR. WINGATE: Yeah, uhm-hmn.

"THE COURT: What was that income from?

"MR. WINGATE: Well, I was doing a little gambling.

"THE COURT: Gambling?

"MR. WINGATE: Yes.

"THE COURT: You're a gambler?

"MR. WINGATE: Well, yes, I am.

"THE COURT: What you're telling the court is that you didn't declare any of your gambling income? Is that what you're telling me?

"MR. WINGATE: Well, this—

"MR. WALKER: I don't think that's quite right, your Honor. The gambling income went into the bank account, too.

"THE COURT: Did all of it?

"MR. WALKER: Well, apparently not, according to the reconstruction by use of a net worth.

"THE COURT: Well, the net worth was acquired by the accumulation of deposits in and out of the account?

"MR. WALKER: No; assets, increase of assets.

"THE COURT: Assets?

"MR WALKER: Each year, over increase of obligations.

"THE COURT: Well, the bank deposits were part of the increased asset theory?

"MR. PRITCHARD: Your Honor, that's right. Mostly it was just assets minus his liabilities. We came

up with the net worth increase of over half in that one particular year, some eighty-some thousand dollars, when he should have reported that amount and only reported forty-some thousand.

"THE COURT: Is that correct, Mr. Wingate?

"MR. WINGATE: Yes.

"THE COURT: All right, I'll accept the plea from Mr. Wingate and I'll refer him to the probation department for pre-sentence investigation report."

It is clear from the above that the defendant indicated that he did not report all his income.[1] The defendant's tax return was filed on his behalf by a person knowledgeable in the filing of tax returns. The defendant advised that the individual filing his return did so upon information received from the defendant. But, it is quite clear that the defendant, because of his failure to keep adequate records, was not conscious of the amounts he actually earned. The defendant is in the gambling business and it is apparent the records from this business were not adequate. The defendant believed he was reporting a sufficient amount to cover income derived from that business.[2] The defendant's true income was computed by a net worth analysis. The defendant was not nor could he be expected to know the precise amount of income stated in the indictment. But, the

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record discloses that the defendant was aware that he had substantial income in addition to the amount derived from carpentry work. The large amount of income not reported, together with the knowing failure to keep adequate records of income earned, is sufficient for a finding that the defendant knowingly and wilfully evaded a large portion of his tax. *Holland* v. *United States*, 348 U.S. 121, 139 (1954). The government need not show the precise amount defendant attempted to evade, but rather only that a substantial amount was in fact evaded.

Accordingly, the petition to withdraw the plea of guilty should be and hereby is denied.

ROBERT E. DEMASCIO
United States District Judge

Dated: Nov. 1, 1973.